QUESTIONS PRESENTED

A. Is it proper function of a Court of Appeals, once having found error, to determine whether that error was prejudicial and does its conclusion, based upon the error not being an incorrect statement of the law, the invitation of that error by the complaining party and the factual record which demonstrated that another result would not have been obtained, warrant review upon a petition for certiorari under United States Supreme Court Rule 17.

B. Has Federated stated any ground for the issuance of a writ of certiorari authorized by Rule 17 of the United States Supreme Court Rules in its request that this Court review the record of a six-week trial to determine whether the Court of Appeals wrongly concluded that adding words such as "and that means a factor which made a difference" to the phrase "a determining factor" would not have altered the outcome of this trial.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs in this action and Respondents before this Court are three individuals, Philip Cancellier, John Costello and Zelma Smith Ritter. The Defendant-Petitioner is Federated Department Stores, Inc., d.b.a. I. Magnin; I. Magnin is, and was at all relevant times, an operating division of Federated.

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No. 82-49

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC., d.b.a. I. MAGNIN,
Petitioner,

VS.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and
ZELMA SMITH RITTER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion rendered by the Court of Appeals, as modified upon Federated's Petition for Rehearing, is attached as Appendix A. The opinion, as yet in unmodified form, is reported at 672 F.2d 1312 (9th Cir. 1982).

JURISDICTION

The jurisdiction of this Court and of the Court of Appeals is correctly set forth in Petitioner's brief. Plaintiffs predicated jurisdiction over the action upon the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 626(b) and (c) and upon 28 U.S.C. § 1337, 28 U.S.C. § 1332 and the federal court's pendent jurisdiction.

STATUTE INVOLVED

The statute involved is the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* Petitioner's brief sets forth relevant portions of the statute.

STATEMENT OF THE CASE

This action, tried before a jury in December 1980 and January 1981, contested the termination of three long-term I. Magnin executives: Philip Cancellier, last employed as Vice President of Stores/Operations; John Costello and Zelma Smith Ritter, employed respectively at the time of terminations as Divisional Merchandise Manager/Accessories and Buyer-Sports Apparel. All were terminated in early 1978; all were in their early 50's at the time of discharge and all had worked for I. Magnin throughout their careers.

Each Plaintiff prevailed on three causes before the jury; violation of the ADEA, breach of personnel policies and violation of a covenant of good faith and fair dealing implied by California law in contractual relationships. The latter two causes were pled as arising under the court's pendent jurisdiction; at no time did Federated move to dismiss those claims.

Because the questions presented by Federated all dispute the Ninth Circuit's conclusion that the jury verdict would not have differed had the district court further explained its instruction that age must have been a determining factor in the employer's personnel policies or practices and in the Plaintiffs' terminations, this Statement of the Case will summarize the record evidence of age discrimination and delineate the ADEA instructions presented to and given by the district court.

A. The Record of Age Discrimination

The Court of Appeals was polite to the Petitioner in its statement that "this case was not decided by a hairsbreadth" (p. A-5 of Appendix A). In addition to circumstantial proof of discrimination meeting the framework established by *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973), the record was replete with direct evidence that Federated at its I. Magnin division had for many years implemented a policy of age discrimination which permeated its personnel practices in the areas of hiring, evaluation, promotion and discharge. The record also contained direct evidence, recorded in the hand of I. Magnin's Vice President of Personnel, that such policy had been specifically applied to each of the Plaintiffs in conjunction with their discharges. Examples of the direct proof of age discrimination contained in this record are:

1. A 1969 study of departments selling merchandise bought by Plaintiff Ritter which referred to the salespeople in San Francisco as "terribly old," "super-annuated" and concluded that I. Magnin needed that " 'ageless' salesperson of thirty to forty-five who relates more effectively to both customer and merchandise." The report also noted that one department should be "much younger in both setting and selling." (Plaintiffs' Ex. 46, R.T. Vol. 15, pp. 2389-2398).

2. A February 1970 document prepared by Federated entitled "Organization and Key Manpower Plan (1970-1975)" which contained what was termed an "age distribution analysis" showing that I. Magnin's key executive group was generally older than its counterparts in other Federated divisions. The Plan suggested a course of action arising from the observation of executives' ages in the following statement: "A more subtle question relates to the implications of this age distribution upon Magnin's goal

to have increasing impact in the youth market. An aging study of the rest of Magnin's management might disclose the need for the planned introduction of younger personnel —particularly in the merchandising and sales area." (Plaintiffs' Ex. 1).

3. A reference in the same 1970-1975 report equating age with a lack of promotability in the statement about one employee that "because of age (59) she has, of course, reached her potential." (Plaintiffs' Ex. 1).

4. A form used until approximately two months before trial to recruit executive personnel entitled "Personnel Specification Sheet" which listed as one of the seven categories of information relevant to the selection process "Desirable Age." (Plaintiffs' Ex. 7, R.T. Vol. 15, pp. 2430-2431).

5. Written communications over the period from 1975 through the end of 1979 between I. Magnin and one of its executive placement firms, Business Careers, Inc., showing the utilization of a youth criterion in the hire of executives. Candidates for hire are consistently referred to as "young" and "energetic" or "ambitious." In July 1975 Business Careers wrote to the then Vice-President of Personnel: "Rest assured, Mr. Hughes, we shall continue to recommend to you outstanding young men with fashion management experience as we have in the past." (Plaintiffs' Ex. 11).

6. The text of a speech given by the Chief Executive Officer to the Federated Board of Directors in October 1975 stating that I. Magnin's junior departments were "staffed by the young" and were "young, bright and bouncy." (Plaintiffs' Ex. 34, pp. 2-3; R.T. Vol. 4, pp. 322-325).

7. A 1977 organizational chart bearing the label "highly confidential" which identified key executives by their ages

and set forth possible replacements for those executives. On that chart was Philip Cancellier, "age 50," with his eventual replacement, Henry Neloms, then age 33, identified as a possible successor. (Plaintiffs' Ex. 17, R.T. Vol. 20, p. 3379).

8. Testimony by Lydia Dresnek, once a co-Buyer in Plaintiff Ritter's division, that she was informed by her supervisor in September, 1973 of management's plan to get rid of the "old biddies." Dresnek was assured that she would be protected because she "looked young." (R.T. Vol. 11, pp. 1616-1621).

9. Testimony of John Costello that his immediate supervisor referred to a buyer in her early 50's as "menopausal" and as buying handbags which "looked as old as she did." (R.T. Vol. 7, pp. 845-848).

10. Testimony by Cancellier concerning a statement made by the President of I. Magnin that while he was sorry Cancellier was no longer there, the "people at Federated wanted them to get a lot of young people around here." (R.T. Vol. 4, p. 329).

11. A handwritten note made by the Vice-President of Personnel for I. Magnin recording a January 3, 1978 conversation between himself, the Chief Executive Officer and the President of I. Magnin where adverse employment action against Cancellier was discussed containing the following phrase under the initials "PC": "Age 50. Maximum potential!" (Plaintiffs' Ex. 20).

12. Notes of an April 1977 meeting among Costello's immediate supervisor, the President, Chief Executive Officer and Vice-President of Personnel, again the note-taker, containing a review of Costello with "age 53" recorded immediately next to his name. The document, memorializing

an evaluation session, has several references to employees' ages. (Plaintiffs' Ex. 23).

13. A December 1976 notation by the Vice-President of Personnel made in conjunction with an adverse employment action against Zelma Smith Ritter setting forth a calculation of her age, then 51, and her years of service, a calculation which would show whether Ritter was nearing eligibility for coverage under the Federated Supplementary Retirement Plan.

14. A chart introduced through one of Plaintiff's expert witnesses showing that at the beginning of the 1970's, 68% of individuals holding Plaintiffs' positions were 40 years or older but that at the end of the decade 67% of those same positions were filled with persons below the age of 40. (Plaintiffs' Ex. 49).

15. Testimony introduced through Plaintiffs' statistical expert concerning the involuntary terminations of I. Magnin executives potentially qualified to receive Supplementary Retirement Plan benefits during the period 1976 through 1979 expressing the conclusion that the likelihood of such numbers being terminated by chance was less than one in one hundred. (R.T. Vol. 10, pp. 1385-1386).

16. A stipulation introduced at trial that of the executives potentially eligible to receive Supplementary Retirement benefits, only three had ever qualified from the inception of the plan in 1976 through the date of trial in December 1980. (R.T. Vol. 12, pp. 1737-1738).

17. An admission by the former Chief Executive Officer during his trial testimony that I. Magnin had implemented a policy of having younger people in the merchandising areas appealing to younger customers and that "older people" had been "moved" to other areas pursuant to that policy. (R.T. Vol. 20, pp. 3440-3441).

The above listing does not include evidence indirectly demonstrating that each Plaintiff was terminated because of age. Each was replaced by a substantially younger individual or individuals; each Plaintiff presented convincing evidence that the asserted reasons for the termination were pretextual. While this statement will not detail the indirect evidence of age discrimination presented by the Plaintiffs, three examples suffice to convey the pretext inherent in Federated's articulated reasons.

Federated argued at trial that Cancellier had voluntarily resigned his employment. The then current Vice-President of Personnel testified that Cancellier had so resigned notwithstanding that Vice-President's completion of an unemployment compensation form in May 1978 labeling the reason for Cancellier's termination a "discharge" and on which the Vice-President wrote as an explanation for the severance of employment "released for performance reasons." (R.T. Vol. 21, p. 3737; Plaintiffs' Ex. 58).

Although Federated claimed that Costello's work performance was the reason for termination, Federated official Henry Neloms admitted during the trial that Costello's division led the Company in the category of gross merchandise margin percent, viewed by Neloms as an "extremely important" measurement of performance. (R.T. Vol. 13, p. 1875).

Federated claimed at trial that a major reason for Ritter's termination was her swearing even though Federated's own witnesses time and time again conceded that swearing and shouting were day-to-day occurrences in the I. Magnin business world. (R.T. Vol. 13, p. 1960; Vol. 17, pp. 2917-2918, p. 1930; Vol. 19, p. 3322).

In sum, Federated's position before this Court that the evidence was "sharply disputed," as one assumes will be

true of any case that proceeds to trial, does nothing to dispel the Court of Appeals' justifiable reliance upon the overwhelming indicia of age discrimination in this record for its conclusion that "there was ample evidence that consideration of age 'made a difference' in the termination of Cancellier, Costello and Ritter." (Appendix A, p. A-5).

B. The ADEA Instructions

Federated presented forty-four proposed instructions on the ADEA and the elements that each Plaintiff was assertedly required to prove under that statute (C.R. 444). That number, which does not include Federated's proposed instructions on the calculation of damages under the ADEA, was in part due to Federated's submission of separate instructions for each of the Plaintiffs. Printed as Appendix B to this brief are ADEA instructions submitted by Federated concerning Cancellier; the duplicative instructions concerning Costello and Ritter are not repeated. Following its initial instructions, Federated filed an amended instruction No. 21 (C.R. 501); that instruction, given by the court without substantial modification, forms the basis for Federated's contentions before this Court.

Plaintiffs submitted four proposed instructions on the meaning of the ADEA and the standard and order of proof of an ADEA claim. Three of the Plaintiffs' four instructions are printed as Appendix C. The one that is not reproduced concerned the meaning of the ADEA; it was not given by the court. Plaintiffs' Proposed Instruction No. 34, that setting forth the order and elements of proof under *McDonnell-Douglas Corp. v. Green, supra,* was given by the court in substantially unchanged form. The *"McDonnell-Douglas"* instruction has never been challenged by the Defendant in the appeal of this case.

A further instruction proposed by Plaintiffs, No. 36, stated that Plaintiffs need not prove age as a sole or exclusive reason for the Defendant's decision and noted that Plaintiffs were entitled to recover if they demonstrated that "age made a difference in whether the Plaintiff was discharged or adversely affected in his or her employment." Even though the Plaintiffs' proposed instruction contained the language "made a difference," the omission of which Federated now asserts requires a new trial, Federated objected to Plaintiffs' proposed instruction (C.R. 524).

The instructions actually given on the proof of an ADEA claim are set forth in Appendix D. After providing the *McDonnell-Douglas* instruction, the court read the instruction taken from Defendant's Proposed Instruction No. 21. The jury was told, *inter alia*:

> The statute I have just summarized, which is the statute under which Plaintiffs bring part of this action, forbids discrimination because of age. It does not, for purposes of this lawsuit, forbid any other type of discrimination, nor does it forbid any other action or inaction by Defendant relative to Plaintiffs other than discrimination on account of age.

The court continued:

> Age must be a determining factor in an employer's personnel policies or practices before a violation of the Act occurs. Put another way, the basic principle is that an employer has the right to discharge an employee, absent age discrimination. Thus, if you should find that age was not a determining factor in Plaintiffs' terminations, or failure to be reemployed, then you must render a verdict for the Defendant on these issues, even though you might feel their terminations were unreasonable, arbitrary, or unfair.

Having submitted six different instructions concerning the proof of an ADEA claim and having objected to Plain-

tiffs' proposed instruction on the standard of causation, Federated nonetheless has contended before both the Court of Appeals and now before this Court that it deserves a new trial because the district court chose one of its instructions discussing the necessity of finding age to have been "a determining factor" instead of rather than in addition to another instruction which it also proffered containing the phrases "the determining factor" and "but for."[1]

SUMMARY OF ARGUMENT

Federated has presented no "special or important" reasons for the granting of certiorari. It has never been the law that all errors involving substantial rights require reversal.[2] A Court of Appeals is empowered, and indeed

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[1]Plaintiffs do not believe that Federated ever clearly articulated its present objection before the district court as required by Rule 51 of the Federal Rules of Civil Procedure. The only objection phrased by Federated was that cited at Appendix F-3 of Petitioner's brief. Federated contested the omission of Defendant's Proposed Jury Instructions 22, 23, 24, 24A, 24B and 26 on the basis that the "but for factor" was not provided. Federated did not state as it does now that an explanation should have been added to its proposed instruction 21 in order to define the term "a determining factor"; Federated instead continued to insist that the vast bulk of its ADEA instructions including those containing extremely argumentative language, as did 24-A and 24-B, be given as the "heart" of its defense.

[2]Plaintiffs did not concede before the Court of Appeals, and do not here concede, that the ADEA instruction was an erroneous one involving a substantial right. Plaintiffs believe that if any misunderstanding was engendered by Defendant's Proposed Instruction No. 21, is was one arising from an overemphasis on Federated's managerial prerogatives with the instruction's three references to the Defendant's ability to act for non-discriminatory reasons even if those reasons were deemed "arbitrary, unreasonable or unfair." Plaintiffs contend that the instruction could be read as setting too high a standard, leaving an impression that age must be the "sole" reason. Moreover, Plaintiffs have not agreed that the phrase "a

obligated, to examine the entire record to determine whether the error was so prejudicial as to require a new trial. That examination must encompass all circumstances of the case, including the nature of the error, facts as to how the error was introduced and whether a different result would have occurred absent the error.

As noted in its modification upon Defendant's Petition for Rehearing, the Ninth Circuit reached its conclusion of the absence of prejudice in accordance with the standard enunciated by the United States Supreme Court in *McCandless v. United States,* 298 U.S. 342 (1936). There is nothing in the Ninth Circuit opinion or the record of this case which even remotely suggests that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 17, United States Supreme Court Rules.

Federated has proclaimed this case as one of nation-wide import, referring to matters outside the record in support of its proclamation (Federated's Petition, pp. 10-11, fn. 14). Federated does so in an apparent attempt to convince this Court that it must instruct future litigants as to the proper course of trying an ADEA case. The difficulty with Federated's position is that the Ninth Circuit has already accomplished that end. It has told ADEA litigants that the instruction which must be utilized is that set forth in footnote 2 of its Opinion.

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determining factor" did not provide the jury sufficient guidance. In our view, the phrase is one that has ordinary meaning and clearly conveys the concept that age must have tipped the balance in the determination. Notwithstanding this position, Plaintiffs have accepted, for purpose of their opposition to the petition for certiorari, the Ninth Circuit conclusion of error in order to squarely meet the questions posed by Federated.

The only issue remaining is one wholly unique to this case. It is whether the Ninth Circuit acted in a manner warranting this Court's intervention when it concluded that substantial justice does not require a re-trial of this case. That conclusion, premised as it must be upon the entire record, is one well within the realm of authority normally committed to the circuit court level. Indeed, it is hard to imagine a decision of more substantial injustice than one which would require Plaintiffs to re-try a case where they have presented extraordinary evidence of direct discrimination, where they proposed an instruction to which Federated objected setting forth the "made a difference" explanation now sought by Federated and where it was Federated's own language, presented in a maze of ADEA instructions that was utilized by the court and to which Federated now excepts.

ARGUMENT

A. The Court of Appeals' Determination That the Instructional Error Did Not Prejudice Federated Is Not in Conflict with Any Applicable Decision of This Court Nor Is It a Substantial Departure from the Accepted and Usual Course of Judicial Proceedings

Federated seems to suggest at pages 17-19 of its petition that the overwhelming nature of evidence can never justify a conclusion that an error was not prejudicial.[3] Moreover, Federated challenges the Court of Appeals' reliance upon

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[3]Such suggestion is inconsistent with the writings of the commentator cited by Federated at pages 19-20, footnote 19. Justice Traynor is quoted as having written: "Overwhelming evidence may provide support, *even conclusive support*, for holding the error harmless, but it is not invariably conclusive." Traynor, The Riddle of Harmless Error (Ohio University Press, 1970), pages 20-22; emphasis added.

"ample evidence," apparently contending that ample means something different than overwhelming so that even if overwhelming evidence suffices, the Ninth Circuit did not correctly phrase its conclusion.

What the Court of Appeals found was that the outcome of the trial would not have differed even if the jury had been instructed in the manner urged on appeal by Federated. That the result would not have been more favorable to the complaining party even if the error had not occurred is the traditional definition of "prejudice." The record fully supports the Ninth Circuit's conclusion. To contend that the jury would have decided that age did not play a determining role in the Plaintiffs' discharges if it had been told that the phrase "a determining factor" means a factor that makes a difference or a "but for" factor is to argue in the realm of semantics without relationship to the facts of this case.

Weighing the nature of the error in light of the record is precisely in accord with this Court's direction of determining when an error is harmful provided in *Kotteakos v. United States of America*, 328 U.S. 750 (1946). The Court there phrased the necessary test as "what effect the error had or reasonably may be taken to have had upon the jury's decision." 328 U.S. 764. That decision cannot be subject to any presumption requiring reversal whenever a substantial right is involved, as Federated seems to urge here. Instead the presence of prejudice must be determined based upon the particularized factors of the case. The Supreme Court has stated:

> The only permissible presumption would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting.

Id. at pp. 765-766.

Courts of appeals have long engaged in the type of evaluation process undertaken by the Ninth Circuit in this case. That process has included an analysis of the potential impact of the error, whether the error could be attributed to the complaining party and the degree of evidence supporting the result reached below. In *Lynch v. The Travelers Indemnity Company,* 452 F.2d 1065, 1067 (8th Cir. 1972), the court considered the defendant's contention that the district court had erred in advising the jury that plaintiff could recover under an insurance policy if it proved that a windstorm was the direct and efficient cause of the loss. Defendant argued that the correct legal standard was one of "sole" cause. The court concluded that even if the instruction could be deemed error, the use of it did not prejudically affect the substantial rights of the parties as it was unlikely that modification of the instruction would have changed the jury's verdict.

In *Kend v. Chroma-Glo, Inc.,* 478 F.2d 198 (8th Cir. 1973), the court found that an instruction in an agency case which was contested because it used the term "effective cause" without further definition was not error as the court deemed it "unlikely" that a different instruction would have changed the jury verdict.

In the recent case of *Vanskike v. ACF Industries,* 665 F.2d 188, 203 (8th Cir. 1981), *cert. denied,* ..... U.S. ....., 71 L.Ed.2d 867 (1982), the court of appeals upheld a jury determination in favor of the plaintiff even though it found that instructions concerning coverage under the Federal Employers Liability Act were argumentative. The court found that under the circumstances of the case, reversal was not required. Circumstances considered included the facts that the instruction was not substantively incorrect and the evidence supporting coverage was "overwhelm-

ing." The court found that because the instruction would not have changed the result, the error was "harmless."

In *Pherson v. Goodyear Tire & Rubber Co.*, 590 F.2d 756, 760-761 (9th Cir. 1978), the court refused to reverse a jury determination in favor of the defendant even though the jury had been arguably misinstructed on the burden of proof. The elements relied upon by the court in reaching that conclusion included the fact that the appellant's own instruction misplaced the burden, termed "invited error" by the court, the conclusion that the defendant had, in any event, effectively shouldered the burden and the fact that the record indicated a new trial would not result in a different verdict. The court stated:

> Third, a new trial would serve no purpose in any event. . . . We deem it highly improbable that a new trial would result in a verdict favorable to appellant and therefore find that the alleged error did not prejudice appellant.

590 F.2d at 761.

In *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120, 1127-1128 (5th Cir. 1981), the court refused to overturn a verdict concerning coverage under an insurance policy even though the district court did not define the meaning of the term "implied permission." While the court found that it would have been "better practice" to provide explanation of the term, it concluded that the fact that such practice was not followed did not constitute reversible error.

Quoting extensively from the unmodified opinion (*see* pages 13-14 of Petitioners' Brief), Federated argues that the Court of Appeals did not follow the standard enunciated by *McCandless v. United States, supra*, that it must affirmatively appear from the record that error relating to

a substantial right was not prejudicial (Petitioner's Brief, p. 16). It is difficult to ascertain upon what Federated bases this conclusion.

The Ninth Circuit stated that it applied the *McCandless* standard after a careful reading of the transcript and record. The Ninth Circuit also delineated the factors upon which it based that conclusion, particularized factors which are appropriately considered in accordance with this Court's decision in *Kotteakos v. United States of America, supra* and in line with the evaluation processes undertaken by courts of appeals in the cases cited above.

The only reason given for Federated's assertion that the Ninth Circuit did not appropriately follow the *McCandless* standard is its claim that the evidence was "sharply disputed." Federated's denial that it had violated the ADEA is hardly a basis for concluding that the Ninth Circuit either misread the record or stated a standard different from that which it actually applied. There is no provision in Rule 17 which allows for the predication of a petition for a writ of certiorari on a party's disagreement with the outcome of a circuit court of appeals' application of a correct standard to a record which more than justifies the conclusion reached.

There are two criteria for determining when error must result in a re-trial. The error must affect a substantial right of a party and it must be determined that there was prejudice to the party. An acceptance of Federated's position would result in an elimination of the criterion of prejudice from the standard enunciated by this Court in *McCandless v. United States, supra.* Federated, not the Ninth Circuit, has misapplied the *McCandless* test in arguing that once a case is submitted to a jury, as opposed to

being decided upon a directed verdict, all error affecting substantial rights must be deemed prejudicial.[4]

The only error about which Federated could complain is a demonstration that the jury was told it could find for the Plaintiffs if it found age to be one of several factors. No such misimpression could arise from the instruction given. The jury was told that age must have been a determining factor in both the employer's personnel policies and in the Plaintiffs' terminations and told that arbitrary, unfair action was an insufficient basis for an ADEA finding.

The fact that the jury was not misled into applying an incorrect standard of law, the overwhelming nature of the evidence and the fact that Defendant itself submitted the challenged instruction in the midst of several proposed charges which may well have appeared internally inconsistent all strongly support the Ninth Circuit determination in this case and speak loudly of the absence of any question appropriate for a writ of certiorari.[5]

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[4]Federated challenges the significance of the Ninth Circuit's observation that both *McCandless v. United States, supra* and *Fillippon v. Albion Vein Slate Company*, 250 U.S. 76, 82 (1919) involved situations where the jury was told a clearly incorrect statement of a controlling legal principle. The degree of the error and its possible impact upon the jury verdict are indeed factors to be considered in accordance with the particularized analysis announced in *Kotteakos v. United States of America, supra.* The difference between an incorrect and incomplete statement surely relates to the degree to which the error can be presumed to have affected the outcome.

[5]Federated argues that it did not waive its position regarding the instructional error. It is not necessary to reach the issue of waiver because it should be concluded, in any event, that Federated's actions introduced the erroneous instruction into the record. *See Mercer v. Paris Theriot*, 377 U.S. 152, 154 (1964) where the

Federated cites to the recent decision of this Court in *Pullman-Standard v. Swint*, ...U.S., 72 L.Ed.2d 66 (1982) in support of its theory that an appellate court should not second-guess a jury determination by refusing to order a new trial when there was some error below. *Pullman-Standard v. Swint, supra,* does not support Federated's contention. The Court there determined that the circuit court of appeals acted beyond its authority in *reversing* a factual determination of a district court without correctly applying the clearly erroneous standard set forth in Rule 52 of the Federal Rules of Civil Procedure. The result of *Pullman-Standard v. Swint* is to strengthen the authority of the trier of fact, a result which hardly supports overturning the jury verdict in this case.

B. A Writ of Certiorari Does Not Lie Under Rule 17 to Adjust "Semantic Differences" Among Courts of Appeals

Federated submits that this Court should act to approve a "uniform interpretation" of the ADEA standard of causation, an apparent attempt to bring its petition within the criterion of Rule 17 providing that the writ may be granted when a court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter (Rule 17(1)(a)). Federated urges that the appellate courts' utilizations of "a determining factor," "but-for" or "factor which made a difference" demonstrate "semantic" differences which should be resolved by this Court.

Court determined that an error could not be viewed as a deprivation of substantial justice when the complaining party had, *inter alia*, elicited the evidence which it contended should have been excluded during its examination of witnesses.

There have been two decisions faced by circuit courts of appeals in determining the ADEA motivational standard. Must age be the sole or only one factor in the adverse employment action? Both extremes have been rejected; the courts of appeals have found with repeated consistency that it is necessary for a plaintiff to show that age tipped the balance in the decision but not that it was the sole motivation. The courts have phrased that standard variously as "age must have made a difference," age was the "but-for factor" or age was "a determining factor." Try as it might, Federated cannot suggest any real differences in those terms and indeed several courts of appeals have recognized that all standards convey the same concept. It is a concept consistent with the Department of Labor regulations which state that the purpose of the Act is to ensure that age was not "a determining factor" in making any employment decision. 29 C.F.R. § 860.103(c).

The First Circuit in *Loeb v. Textron*, 600 F.2d 1003, 1019 (1979) referred to "the determining factor" as meaning that "but for" the unlawful motivation, the employee would not have been discharged. In *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1111-1112 (4th Cir. 1981) *cert. denied* ....U.S....., 102 S.Ct. 316 (1981), the court stated the test as being "a determining factor", a requirement derived from the *Loeb* "but for" test. The Ninth Circuit in *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-985, fn.17 (1981) referred to the "strong weight of authority" at the circuit court level supporting "some formulation" of the determining factor test. In *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980) and *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2d Cir. 1981), the court noted that there was no significant difference between a determining factor and the standard of "made a difference." *See also Olsen v.*

Southern Pacific Transportation Co., 480 F.Supp. 773, 779, fn.4, (N.D. Calif. 1979) *aff'd* 654 F.2d 733 (9th Cir. 1981). There the court noted no significant difference between a standard which would require a plaintiff to prove that age was a determining factor and one which required the plaintiff to show that the decision would have been different but for age.

We do not believe that Rule 17 can be construed as providing a basis for a petition for certiorari to mandate that the Circuit Courts of Appeals use precisely the same words for a legal standard. The legal concept that age must be more than just another factor but need not be the sole factor has been solidly developed at the circuit court level; there is no basis for Supreme Court intervention under Rule 17.

C. There Is No Basis for Hypothesizing Jury Confusion of the State and Federal Claims

Federated asserts that the instructional error should be of particular concern because the jury could well have been confused about the state and federal claims. No ground exists for the assertion of such confusion. The jury was instructed about the distinct nature of each of the claims. It was told, in the court's use of Defendant's Instruction No. 21, that it could not find an ADEA violation based upon a conclusion that the terminations were "unreasonable, arbitrary or unfair."

With respect to the breach of contract claim, the jury was instructed, largely in accordance with charges submitted by Federated, that it must have found a contract consisting of "offer and an acceptance." It was also told that it could not predicate such a contract upon "uncertain or indefinite" terms nor could it find Federated to be in

breach of any term which was not developed by "mutual consent."

With respect to the duty of good faith and fair dealing claim, the jury was instructed that it had to find the existence of an employment contract, one created by offer and acceptance, before it determined that there was a covenant of good faith and fair dealing.[6] The claims were thus submitted to the jury under separate instructions with distinct elements; the finding of a contract of employment was in no way essential to the ADEA claim, nor was unfair dealing, an essential element of the covenant claim, a criterion submitted to the jury under the ADEA claim.

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[6]The jury was also told that it could not award punitive or pain and suffering damages under the ADEA; moreover, it was clearly instructed that it could not award duplicative damages. (R.T. Vol. 23, pp. 4066, 4075, 4080-4088.)

CONCLUSION

Federated has not articulated a ground under Rule 17 that would warrant the granting of its petition for certiorari. The reason for that lack of articulation is clear; there is no issue raised in this case falling within the parameters of Rule 17. There is no conflict in the Court of Appeals cases cited by Federated concerning the motivational standard applicable to an ADEA case. There is nothing about the Ninth Circuit's determination of harmless error which requires this Court's intervention under Rule 17.

Any decision that a circuit court of appeals could no longer review a trial record to determine whether an error was prejudicial would denigrate, not further, the federal judicial system by requiring needless re-trial of cases where the evidence was overwhelming. The Ninth Circuit's efforts to direct the trial of future ADEA actions while affording justice to the parties before it based upon the applicable standard of review are consistent with, rather than a departure from, the federal standard of justice.

Dated: August 6, 1982.

Respectfully submitted,

MAUREEN E. MCCLAIN
LITTLER, MENDELSON, FASTIFF & TICHY
Counsel of Record for Respondents

(Appendices follow)